

## PANEL ON CIVIL PROCEDURE

By:

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### I. Use of Comparative Law and ALI/UNIDROIT Principles and Rules

Principles of civil procedure, whether contained in court rules and case law as in common law countries, or in codes as in civil law countries, are critical for establishing consistency and fairness in the administration of a country's court system. In a global economy, it also serves to insure that all parties, domestic or foreign, will be treated equally before the courts of other countries. There is considerable room for diversity in civil procedure from country to country. The principles must be suitable for the needs of the particular country and take into account its particular culture, history, and political and social framework. But "it is important to keep in mind that all modern civil procedural systems have fundamental similarities" and "must respond to several inherent requirements." ALI/UNIDROIT PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE (Proposed Final Draft, March 9, 2004), 8.

The ALI/UNIDROIT project set out to identify the fundamental requirements and to draft, with commentary, principles and rules of transnational civil procedure. They are relatively abstract, stated in terms of standards and objectives, rather than black-letter requirements. They are intended to provide guidance for drafters in individual countries, but not a model law to be adopted *in toto*. In some cases, they feel it necessary to make a choice between conflicting countries' approaches, for example, in rejecting American "notice pleading" for the more broadly accepted standard that "the plaintiff must state the facts on which the claims is based, describe the evidence to support those statements, and refer to the legal grounds that support the claim, including foreign law, if applicable." *Id.* at 88 (Rule 12.1). Of course, this choice must also be seen in relation to the unavailability of broad discovery in countries other than the United States, indicating the intertwining nature of the policies and justifications for certain rules within a country's total civil procedure system.

References to ALI/UNIDROIT at appropriate places in the first-year course in civil procedure can provide an important source for making students think about what is behind the rule. References to provisions of particular country's codes of civil procedure provide a similar source, and, indeed, a provision in a particular code that conflicts with the American rule can be used to highlight the conflict, with further resort to how the issue was dealt with by ALI/UNIDROIT.

Areas in which comparative law references can be especially helpful include pleading, pre-trial motions, summary disposition, discovery, mechanisms for joinder and expansion of suits, presentation to the judge/jury, admissibility of evidence, role of counsel and judge, attorney's fees, appellate review, and preclusion. I will give some particular examples. I will also draw on a few examples from my experience in assisting in a USAID project to draft a new Code of Civil Procedure for the People's Republic of Vietnam, with some focus on differing principles in Socialist and Islamic legal traditions.

## II. Increasing Congruence of Legal Systems

Civil procedure casebooks inform students of the difference between civil and common law. In terms of procedure, civil law systems are often referred to as "inquisitorial" and common law systems as "adversarial." Today it is no longer possible to speak simply of these stereotypes as either dominant or distinct approaches to law in many countries. The two procedural systems have increasingly influenced each other, and have, in turn, been influenced by other systems and traditions. For example, although judges in the civil law tradition have been central to moving a case forward and shaping the taking of proof, increasingly it is recognized that the parties and their attorneys must also play a critical role. And although judges in the common law tradition tended to leave the investigation and presentation of facts to the parties and their attorneys, increasingly American judges play a critical role in case management and the search for truth and justice.

I will give a few examples of how the principal legal systems have drawn on each other and moved closer together, as discussed in part in my article, *The Evolution of American Civil Trial Process Towards Greater Congruence with Continental 'Dossier Trial' Practice*, 7 *Tulane Journal of International & Comparative Law* 125 (1999). See also Marcus, *Putting American Procedural Exceptionalism into a Globalized Context* (forthcoming, reviewing six recent books relating to this issue).

Class or representative actions provide a particularly timely example of the interplay between legal systems. Many countries, and in particular those of the European Union, are displaying great interest in the American class action:

Other countries have eyed the American class action with both admiration and suspicion. There is recognition that the traditional single-party model of adjudication is not well-suited to situations today when the claims of many individuals arise from the same as basic conduct of a defendant. Not only does this involve a waste of judicial resources, but it can also effectively deny legal recourse when the cost of individual litigation would exceed any possible recovery.... Most European countries eschewed American class action practice until quite recently, although

some had distinctive procedures permitting expanded standing and aggregation through ‘group litigation.’” In 1998, a directive of the European Parliament and Council required the member’s countries to implement certain forms of group litigation by the end of the year 2000, and that directive is being implemented in different ways by the various EU countries....

While other countries display a growing interest in American class actions practice for litigation arising from defective products, deceptive trade practices, and environmental conditions, they tend to react negatively to the American litigation landscape. Horror stories about an overly litigious society, entrepreneurial plaintiff attorneys, runaway jury verdicts, abusive class action practices, and legal blackmail through meritless suits that drive up business costs are well-known abroad. Whether or not such stories convey an accurate picture, most other countries view American class actions as a Pandora’s Box that they want to avoid opening. Thus, a good deal of attention is being devoted these days to studying and experimenting with procedures for aggregation of cases that can avoid the perceived excesses of the American experience.

Sherman, *American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems*, 215 Federal Rules Decisions 130, 130-132 (2003). See also Rowe, *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions*, 13 Duke Journal of Comparative & International Law (2003); Gidi, *Class Actions in Brazil – A Model for Civil Law Countries*, 51 American Journal of Comparative Law 311 (2003).

Most first-year civil procedure courses do not have time for extensive study of class actions, but some examples of representative and group litigation in other countries are useful in introducing students to American class actions. When there is an advanced civil procedure course in Complex Litigation (in some schools it is an elective in the spring of the first year), the comparative materials are very helpful.

### III. A Separate Course in Transnational Law

An innovative curriculum might introduce a separate course in Transnational Law that combines civil procedure with such substantive areas as Contract, Torts, and Constitutional Law. This would be a challenge for first year, but such an interdisciplinary approach could be rewarding. In any event, such a course could be valuable in second or third year.

The following is an outline for a “theme-oriented” Transnational Law course entitled “Extraterritoriality”<sup>1</sup> that attempts to avoid the course simply being a comparative law course in which various approaches to a large number of issues is taken:

*Course Description:*

The territorial notion of sovereignty has long been widely accepted. “All legislation,” wrote the U.S. Supreme Court in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) “is prima facie territorial.” However, with globalization, extraterritoriality – when the laws and related legal proceedings of countries may be given effect outside their sovereign territory – has arisen in many forms.

The current phenomenon of extraterritoriality can be viewed on a continuum. On one end is the voluntary relinquishment of sovereignty to regional or international bodies (as in joining regional trade and political unions like the European Union or multilateral trade bodies like the World Trade Organization). On the other end is the unilateral application of another country’s laws extraterritorially through political or economic power or pressure (one country’s denial of another country’s attempt to apply its laws is also an aspect of the extraterritoriality phenomenon). In between are the plethora of relations between countries that have trade and political relationships under which they may be willing, for pragmatic reasons, to accommodate to the extraterritorial application of, or harmonization with, another’s country’s or entity’s laws. The two ends of the continuum are not necessarily good or bad, although the manner in which extraterritoriality is accomplished may affect both the amicability of relations between countries and the effectiveness of the laws sought to be enforced.

The consequences of extraterritoriality can especially be seen in the administration of areas of the law that have been central to globalization – trade law, antitrust/competition law, securities and investment law, corporate governance, transfer of technology, protection of intellectual property rights, franchising, labor standards, and environmental protections. This course will consider the impact of extraterritoriality on those areas of the law and how extraterritoriality plays out in practice.

Extraterritoriality may also make demands on countries to provide the necessary procedural mechanisms within their legal and political systems to ensure the enforcement of the extraterritorial standards. Thus, such procedural features of a legal system as jurisdiction over foreign

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<sup>1</sup> The structure of such a course derives in part from discussions with my colleagues, Professors Joachim Zekoll, Gunther Handl, and Jonathan Nash, concerning a future joint Tulane-University of Frankfurt conference on this topic.

persons and entities, enforcement of judgments, assistance in obtaining evidence, recognition of rights and remedies, availability of provisional measures from the courts, granting of preclusive effects, and provisions for group/class action or other joinder mechanisms may be affected. These procedural applications will be considered in this course in a practice-oriented format.

